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Moving Beyond *Daubert and Frye* and the Standards for the Admission of Psychological Evaluations and Related Testimony in Child Custody Disputes

By David I. Grund
Grund & Leavitt, P.C.

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Introduction

A number of U.S. Courts have established legal standards by which child-custody evaluations are rendered (see 750 ILCS 5/604(b); 750 ILCS 5/604.5; and 750 ILCS/605). In large urban areas, psychologists and other mental health professionals typically perform child-custody evaluations. In smaller jurisdictions, attorneys conduct custody evaluations or GALs appointed by the courts. But regardless of whether a child-custody evaluation is performed by a mental health professional or a layperson appointed by a court, a consistent problem is that few states have adopted standards by which custody evaluations are performed. Consequently, there are no uniform methods by which custody evaluations are performed. Indeed, in most states, there are no training, educational, or experience requirements by which evaluators are selected; nor are there rules in place which mandate the do's and don'ts of such things as *ex parte* communication, procedure, data gathering, scope, testing, or admission of expert testimony.

The American Academy of Child and Adolescent Psychiatry (AACAP), the American Psychological Association (APA), the Association of Family Conciliation Courts (AFCC), and the American Academy of Matrimonial Lawyers (AAML), have developed guidelines and standards for child-custody evaluations.

For example, the APA revised its guidelines in February 2009. They consist of 14 individual guidelines that are aspirational in nature and not mandatory upon its members, nor are they intended to be either mandatory or exhaustive.

Likewise, in 2006, the Association of Family and Conciliation Courts (AFCC), an interdisciplinary group of attorneys, judges and mental health professionals with a shared interest in family law, published its revised Model Standards of Practice for Child Custody Evaluations. The purpose of the adoption of these standards was to contribute to the ongoing education of evaluators and to promote good practice so that the work done by custody evaluators may be publicly accepted.

While similar to the AFCC in purpose, the focus of the AAML's model is to emphasize a common understanding between the mental health professionals and the legal professionals. During his presidency of the AAML, Gae Ferro formed a committee to prepare uniform child-custody evaluation standards. The intent of these published standards is to aid those professionals to have a common understanding of the necessary training, skill, and experience required to conduct a custody evaluation and that courts utilize these standards in their selection of custody evaluators. The committee developed these standards in consideration of the then existing guidelines (the AFCC Model Standards and APA guidelines). In doing so, the committee utilized and incorporated into its standards for determining expertise the two leading cases for the determination of the admissibility of scientific evidence, *Daubert v. Merrell Daw Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786 (1993), and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Finally, the AACAP established its "Practice Parameters for Child Custody Evaluations" in 1997. I'm told by Dr. Kraus, who is presently leading the committee, that these practice parameters are being revised. As they now stand, they are merely a guide for clinicians to evaluate the often delicate and complex issues surrounding a child custody dispute.

Thus, there are outstanding groups of committed and earnest professional working to bring standards to child-custody evaluations, but their efforts have unfortunately been largely ignored.

In most jurisdictions, neither the courts nor their custody evaluators are given any guidelines for performing an evaluation. However, California is one notable exception. The rules of court adopted under its Family Code Paragraph 211 and Paragraph 3117 (Rules 5.220 through 5.235) set out the scope, qualification requirements (training, education, experience), report writing, and ethics (prohibiting *ex parte* communication by the evaluators with attorneys and the court) for evaluators, as well as establish the process, methodology and qualifications of evaluators and their assessments.

In sum, I believe Illinois (and other states) need to do what California did — create clear standards for the qualification of child-custody

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evaluators, their methodology, and their evaluations, as well as provide clear ethical guidelines and procedures for those professionals, attorneys, and the courts. To that end, the legal community, the mental health profession, the court, and the legislature need get together and put forth a coordinated effort towards this important goal. Children deserve no less.

Background

Between 1923 and 1993, the standard for the admissibility of expert testimony outlined in the landmark case, *Frye v United States,* 293 F. 1013 (D.C. Cir 1923), reigned supreme across the United States, not only in federal court, but also in the majority of state court systems. In the *Frye* case, the D.C. Circuit Court of Appeals was faced with the novel question of whether or not a deception test, which was a predecessor to the modern polygraph, and which was offered by the defendant, should have been admitted into evidence over the state's objection. The D.C. Circuit held that the district court properly excluded the deception test. In reaching its conclusion, the D.C. Circuit emphasized that the standard for admissibility of scientific expert opinion or testimony is that the science upon which it is based must "have gained general acceptance in the particular field in which it belongs." *Id* at 1014. The "general acceptance" standard quickly took hold throughout the federal court system, and spread to a majority of the state court systems as well. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) (citing E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983)). It should be noted that the *Frye* standard of general acceptance, in its true form, applies exclusively to novel scientific techniques. *Daubert,* 509 U.S. 579 at 592.

In 1993, the Supreme Court of the United States held that the "general acceptance" standard developed in *Frye* had been superseded by Rule 702 of the 1975 Federal Rules of Evidence (FREs). *Id. Daubert v. Merrell Dow* has been considered a watershed case in the area of expert testimony, as it outlined new and more extensive guidelines for determining admissibility in regards to expert testimony. The *Daubert* case involved suits brought on behalf of minors who had been born with severe birth defects, allegedly due to their mothers' ingestion of the defendant's drug, Bendectin, in utero. Expert testimony was offered by the plaintiffs to establish the causal connection between the ingestion of Bendectin by the mothers and the subsequent development of severe birth defects in their children. *Id.* However, because the testimony involved a scientific approach that had not yet gained general acceptance in the scientific community, the testimony was barred under the *Frye* standard. *Id.* As a result, the defendants prevailed on their motion for summary judgment. *Id.* The Supreme Court, however, vacated the summary judgment, holding that: the 1975 FREs superseded the *Frye* standard; the FREs were meant to relax the traditional barriers to opinion testimony; the FREs do not require "general acceptance" in the scientific community; and the trial court judges are meant to serve as the "gatekeepers" to the admission of expert testimony. *Id.*

The *Daubert* Court further elaborated upon the standard to be utilized by judges in their role as gatekeeper by providing a non-exhaustive, non-binding list of factors to be considered. *Id* at 592. Pursuant to rule 104(a), the judge must determine whether the proposed testimony involves "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id* at 592. In order to make this determination, judges are to consider various factors, including, but not limited to: whether or not the theory or technique can be or has been tested; whether or not it has been subjected to peer review and/or publication; its known or potential error rate and the maintenance of standards related to its control; and whether it has gained widespread acceptance within the *relevant* scientific community (emphasis added). *Id.* In the years since the *Daubert* standard was announced in 1993, it has been adopted by not only the federal courts, but also by an increasing number of state courts. Notably, however, several states, including large and influential states such as Illinois, New York, Florida, and California, have refused to adopt the *Daubert* standard, opting instead to maintain the *Frye* general acceptance standard of admissibility.

Perhaps more importantly, even where *Daubert* has been adopted as the standard for admissibility, the way in which that standard has been interpreted varies significantly across jurisdictions. For example, despite the fact that the *Daubert* Court explicitly stated that the FREs, which govern the admissibility of expert testimony, were meant to relax traditional barriers to expert opinion testimony, *Daubert,* 509 U.S. 579 at 588, many of the courts that have adopted the *Daubert* approach have interpreted the standard as a more stringent one; as a way to keep "junk science" out of our courts. Dixon, L. and Gill, B., *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Decision*. RAND Institute for Civil Justice, 2002. Therefore, whereas the purpose of the *Daubert* decision was to clarify the standard for the admissibility of expert opinion testimony, the result has been increased confusion and an increasing divide in the way jurisdictions apply

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the standard, with some jurisdictions interpreting *Daubert* as a significantly relaxed standard in comparison to *Frye,* while others hold that it is a more stringent one. See *United States v. Brown,* 415 F.3d 1257 (11th Cir. 2005), cert denied, 126 S.Ct. 1570 (2006); Jeffry D. Cutler, *Implications of Strict Scrutiny of Scientific Evidence: Does* Daubert *Deal a Death Blow to Toxic Tort Plaintiffs?,* 10 J. ENVTL. L. & LITIG. 189, 214 (1995).

Finally, in the years since *Daubert* was decided, the Supreme Court has handed down two decisions explicitly related to *Daubert: G.E. v. Joiner,* decided in 1997, and *Kumho v. Carmichael,* decided in 1999. In *Joiner,* the Supreme Court held that the abuse of discretion standard is the appropriate standard for reviewing a district court's ruling on an evidentiary hearing. *G.E. v. Joiner,* 522 U.S. 136 (1997). Two years later, in 1999, the Supreme Court held that the *Daubert* standard applies not only to scientific expert testimony, but also to other expert testimony. *Kumho v. Carmichael,* 526 U.S. 137 at p. 152. Of particular significance to the discussion below, the *Kumho* Court held that expert testimony that is based upon professional studies or professional or personal experience must also meet the *Daubert* standard in order to be admissible. *Id.*

Application to Child Custody Proceedings

Domestic relations laws, which govern child custody disputes, are the exclusive province of the states, and as such, the *Daubert* decision and its progeny did not automatically bind family courts across the country. See *Rose v. Rose,* 484 U.S.619 (1987). Nonetheless, because approximately half of the state court systems throughout the country have adopted some variation of the *Daubert* standard, whether by legislation or by judicial determination, it is necessary to consider the implications of both standards in regards to the admissibility of child custody evaluations. See Bernstein, David Eliot and Jackson, Jeffrey D., *The* Daubert *Trilogy in the States.* Jurimetrics, Vol. 44, 2004; Helland, Eric A. and Klick, Jonathan, *Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States* (March 20, 2009). U of Penn, Inst for Law & Econ Research Paper No. 09-12; Robert Day School of Economics and Finance Research Paper No. 2009-06 (Available at http://dx.doi.org/l 0.2139/ssrn.1370518.) Additionally, some states that have adopted the *Daubert* standard have also adopted *Joiner* and *Kumho,* while others have declined to adopt one or both of the latter decisions. *Id.* In short, with regards to domestic relations law, the standard of admissibility for expert opinions is anything but uniform, as some states adhere to *Frye;* some to their own test; some to *Daubert* alone; others to *Daubert* and one of its progeny; and still others to the whole *Daubert* trilogy, the exact meaning of which differs across jurisdictional lines. *Id.*

As in other areas of the law, trial courts are granted broad discretion in their adjudication of domestic relations cases. The strength of the trial court's power in child custody disputes is bolstered by the Supreme Court's holding in *Joiner,* which requires that evidentiary rulings be reviewed under an abuse of discretion standard, a standard that is highly deferential to the trial court. *Joiner,* 522 U.S. at 143. It is perhaps due to the combination of the significant variation in the standard of admissibility of expert testimony; the broad discretion of the trial court; the deferential standard of review; the fact that a custody evaluator's testimony is merely one of numerous factors to be considered in determining custody (see, e.g. 750 ILCS 5/603); that the judge is free to reject the expert's recommendation; and economic factors that there are relatively few appellate court opinions or scholarly articles regarding the admissibility of child custody evaluations and related testimony.

***Frye* Analysis**

Further understanding can perhaps best be elucidated through examination of a few specific cases wherein the admission of expert testimony aimed at influencing the ultimate custody determination was scrutinized. Notably, as can be seen by the selection of cases here, some of the most thorough (published) discussions of the admissibility of custody evaluations and other related psychological testimony have been raised in *Frye* states. See *People v. McKown,* 236 Ill.2d 278; *In re Marriage of Jawad,* 326 Ill. App.3d 141; *In re Marriage of Gambla,* 376 Ill.App.3d 441; *Matter of Faith D.A.,* 946 N.Y.S.2d 69. These cases examine three key issues: what is science; are custody and other psychological evaluations "scientific" and therefore the appropriate subjects of *Frye* hearings; and if so, is a typical child custody evaluation admissible?

As outlined above, expert testimony need only meet the *Frye* standard of admissibility if it is considered to be based upon "science," indeed "novel" science. *Daubert,* 509 U.S. 579. One can certainly imagine an argument that custody evaluations and other related psychological evaluations are not science at all, and are therefore need not pass the *Frye* test. However, at least in Illinois, this argument stands on shaky ground. In *People v McKown,* the Illinois Supreme Court held that evidence that is labeled as "scientific" carries significantly greater weight; that accordingly, scientific evidence must meet the *Frye*

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standard; and that "scientific" means that it is the product of scientific studies or tests. *McKown,* 236 Ill.2d. It would seem, then, that under Illinois law, a custody evaluation that relies solely upon personal evaluations would not be considered "scientific" evidence, and because it would not be given the extra weight of labeling it "scientific," it would not be the appropriate subject of a *Frye* hearing. However, it is not realistic to think that an expert would present an evaluation or offer testimony that did not include reliance on test, studies, or both. This is clearly illustrated in the case of *In re Jawad. Jawad,* 326 Ill.App.3d.

In re Jawad involved a petition for a preliminary injunction in the midst of an ongoing dissolution proceeding, which was to include a determination as to the custody of the parties' three minor children. *Id* at 142-3. The mother petitioned for a temporary injunction to require that visitation between the children and their father be supervised, as she feared that the father, a dual citizen of the U.S. and Iraq, would abduct their children and take them to Iraq. *Id* at 143. In support of her petition, the mother offered the expert testimony of Maureen Dabbagh, a consultant in international child abduction, who concluded that there was a "grave risk" that the father would flee with the children. *Id* at 147; 149. Dabbagh testified that she had been involved in approximately 300 international abduction cases, that she had spoken on the topic several times, and that she had done extensive research though she had no formal education in international child abduction. *Id.* The father objected to her testimony, arguing that Dabbagh was unable to establish that her opinion was based on a body of knowledge or standards that had been accepted, but the trial court allowed her to testify as a non-scientific expert. *Id* at 148.

The trial court ultimately chose to discredit Dabbagh's testimony, and the mother's petition was denied. *Id.* at 151. On appeal, the mother argued that the trial court had abused its discretion in denying her petition. *Id.* In order to address the mother's argument, the appellate court analyzed the admissibility of Dabbagh's testimony, which it viewed as the essential component of the mother's petition. *Id.* At 151-3. The Appellate Court noted that the evidence would be relevant and that it was therefore necessary to determine whether or not the evidence was "scientific," thus implicating the *Frye* standard. *Id.* at 153. Citing Dabbagh's use of factors that had been drawn from the literature and studies of psychologists in the field, the Appellate Court held that her opinion was based upon a (novel) form of "science" and therefore should have been subjected to a *Frye* analysis. *Id.* at 154. It should be noted that while a custody evaluation and psychological evaluations of the parents had been ordered and performed, and were utilized in Dabbagh's analysis, their admissibility was neither challenged, nor discussed. *Id.*

In re Marriage of Gambia involved a prolonged custody battle in which both of the two custody evaluators involved in the case recommended that primary custody be awarded to the father. *Gambia,* 376 Ill. App.3d at 446; 449. The mother attempted to discredit the validity of their recommendations through the testimony of her own experts who posited that the custody evaluators failed to consider certain critical factors in their analysis of the psychological tests and in drawing their conclusions. *Id.* at 454-5. Ultimately, the trial court awarded custody to the mother, and the father appealed, contended that its decision was against the manifest weight of the evidence and, pertinent to the discussion here, that the trial court erred in admitting the testimony of the mother's expert, Dr. Thomas. *Id.* at 459. The father argued that Dr. Thomas' opinion in regards to the effect that the mother's race could be expected to have upon both the testing results and also the child's identity formation did not meet the *Frye* standard for admissibility. *Id.*

In analyzing the latter argument, the Appellate Court reaffirmed that the Frye test applies only to "novel" scientific evidence. *Id.* at 460. Of note, the Court appeared to conclude without consideration that the evidence sought to be introduced relied upon scientific theory. *Id.* Drawing upon evidence introduced by the other experts in the case, which acknowledged the theories upon which Dr. Thomas based her opinion (but which the other experts felt was not determinative in this particular case), the Appellate Court held that a *Frye* hearing was not necessary to admit Dr. Thomas' expert opinion because while based upon scientific theory, it was not based upon a "novel" scientific theory. *Id.* at 461.

It is not difficult, based upon the analyses presented in these Illinois cases, to reach the conclusion that most child custody evaluations, which tend to rely on scientific literature and tests, will be deemed to be scientific, but will often fall outside of the scope of *Frye* analysis due to the fact that custody evaluators do not typically utilize theories that "do not resemble something formerly known or used." *Donaldson v. Cent. Ill. Pub. Serv. Co.,* 199 Ill. 2d 63 at 79, quoting Webster's Third International Dictionary 1546 (1993).

Daubert Analysis

As outlined above, there is no clear consensus as to what the *Daubert* standard means in terms of whether the admission of scientif-

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ic expert opinion is more or less challenging under *Daubert* than under *Frye* or other standards. See Cutler (1995). Notwithstanding the lack of uniformity and clarity, *In re D.C.J.,* a 2012 case from the Court of Appeals of Ohio, demonstrates how the analysis of the admissibility of expert testimony in child custody disputes might play out in at least some *Daubert* states. *In re D.C.J.* involved a long, drawn-out custody battle between a father and the child's maternal grandparents. *In re D.C.J.,* 976 N.E.2d 931 at 934-5. At trial, the father's attorney requested a *Daubert* hearing as to the admissibility of the court-appointed child custody evaluator's testimony, which recommended that custody be granted to the grandparents. *Id.* at 938-9. The father's *Daubert* objection was granted in part, and the expert was not allowed to testify as to any collateral information that was utilized during the process of his evaluation or in coming to his conclusions. *Id.* The grandparents filed a timely appeal, asserting, among other things, that the court's awarding custody to the father was against the manifest weight of the evidence and that, germane to the discussion at hand, the trial court had erred in limiting the custody evaluator's testimony. *Id.* at 935; 937.

The Appellate Court first noted the broad discretion afforded the trial court in determining the admissibility of expert testimony and then reaffirmed that Ohio is a *Daubert* state that adheres not only to the standard outlined in *Daubert* as to scientific expert testimony, but also to its extension to all expert testimony, as announced in *Kumho. Id.* at 938. In holding that the trial court had committed an error in barring the expert from testifying as to collateral information that he utilized in the process of his evaluation, the Appellate Court emphasized that "relevant evidence based on valid principles will satisfy the threshold reliability standard for the admission of expert testimony." *Id.* at 940, quoting *State v. Nameth,* 82 Ohio St.3d 202, 211. The Court appeared to conclude, without so stating, that the practice among child custody evaluators of relying upon collateral data and sources of information is based upon valid principles and therefore meets the threshold of reliability required by *Daubert.*

What Does and Should This Mean for Lawyers?

The limited research discussed above suggests that the ultimate admissibility of a child evaluator's or related psychological evaluator's testimony is not likely to change based solely upon whether a *Frye* or a *Daubert* standard is applied. This is likely due, in no small part, to the existence of standards in regards to how child custody evaluations are to be carried out. The American Academy of Child and Adolescent Psychiatry (AACAP), the American Psychological Association (APA), the Association of Family and Conciliation Courts (AFCC), and the American Academy of Matrimonial Lawyers (AAML) have all published guidelines and standards to be implemented by child custody evaluators. Most evaluators, when questioned by the court or by counsel are likely, then, to be able to point to one of these organization's guidelines as providing a frame of reference for their evaluation in any given case, and to therefore avoid being barred from testifying under either a *Frye* or a *Daubert* standard. Considering, however, that the wellbeing of children is at stake, why should this be enough? Indeed, why should Illinois and other court systems settle for anything less than a uniform set of standards and guidelines when it comes to child custody evaluations?

Attorneys and other concerned professionals across the country have begun to ask just this question, which led to the adoption in California of rules that outline not only the methodology and process that must be utilized by child custody evaluators, but also provides parameters for the scope of the evaluation, the way in which the associated report should be written, and the ethical and qualification requirements that evaluators must meet in order to provide their expert opinion to the courts. See California Family Code Paragraphs 211 and 3117. Uniform rules, such as those that now govern in California, if formulated by competent attorneys and mental health care professionals, could have a far greater and more positive impact upon the admissibility of child custody evaluations than either *Frye* or *Daubert* have: they could *consistently* keep so-called "junk science" out of the family courts, where the well-being of our future leaders is at stake, and where "junk science" should have no place.

David I. Grund *is a Founding Partner with Grund & Leavitt. He practices exclusively in the area of family law concentrating in all aspects of matrimonial litigation. In addition to his law practice, he serves as the Director of the Family Law LL.M. program at Chicago-Kent College of Law. Mr. Grund, alongside partners Jody M. Yazici and Marvin Leavitt, authored the* Illinois Practice of Family Law*, currently in its 15th edition, the most widely used family law text by practitioners, judges and law students in Illinois. He can be reached at* ***dgrund@grundlaw.com****.*